No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

ERNEST A. TOLIN,
United States Attorney;
WALTER S. BINNS,
Chief Assistant U. S. Attorney;
RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division;
NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Attorney;
RAY M. STEELE,
Assistant U. S. Attorney,
312 North Spring Street,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellant was indicted under Section 1731(a) of Title 12 of the United States Code, and Section 88 (1946 Edition) of Title 18 of the United States Code, on June 28, 1950 [R.[1] 6]. The District Court had jurisdiction of the cause under Section 3231 of Title 18 of the United States Code. The offenses charged were committed in Los Angeles, Riverside and San Bernardino Counties, within the Central Division of the Southern District of California.[2] Judgment was entered on June 4, 1951 [R. 42-44]. Notice of Appeal was filed on June 14, 1951. This Court had jurisdiction under Section 1291 of Title 28 of the United States Code.

---

[1]References preceded by the letter "R" are to the printed "Transcript of Record"; those by the letters "AB" to the Appellant's Opening Brief.

[2]The Indictment so charged [R. 3-6]. No attack is made on the grounds of lack of venue.

Statement of Case.

On June 28, 1950, the Federal Grand Jury at Los Angeles returned an Indictment against appellant and others in forty-one counts, which was filed that day in the United States District Court for the Southern District of California, Central Division [R. 3-6]. The first count of the Indictment charged the appellant and others with conspiring and agreeing together to make, pass, utter and publish, and cause to be made, passed, uttered and published, false statements, for the purpose of obtaining loans and advances of credit from the Bank of America National Trust and Savings Association, with the intent that the loans and advances of credit would be offered to and accepted by the Federal Housing Administration for insurance, in violation of Section 1731(a) of Title 12 of the United States Code Supplement. The first count also charged the appellant and others with conspiracy to defraud the United States by conspiring to obstruct the functioning of the Federal Housing Administration by causing the Federal Housing Administration to insure loans made to applicants whose applications made under the provisions of Title I of the National Housing Act of 1934, stated that the purpose of the loan was for financing the improvement of existing dwelling houses, in cases where the unrevealed purpose of securing the loans was for the financing of the construction of new dwelling houses, contrary to the provisions of Title I of the National Housing Act of 1934.

The remaining forty counts of the indictment charged the appellant and others with making, passing, uttering and publishing, and cause the making, passing, uttering and publishing of false Federal Housing Administration

Title I Credit Applications, for the purpose of causing the Bank of America National Trust and Savings Association to extend loans and advances of credit to the applicants and with the intent that the Bank of America should offer these loans and advances of credit to the Federal Housing Administration for insurance and with the intent that the Federal Housing Administration accept the loans and advances of credit for insurance. Each of these forty counts involved a single and separate falsified Title I Credit Application.

On August 7, 1950, a Motion to Dismiss and Quash the Indictment herein was filed in the District Court on behalf of the appellant and others [R. 8]. On August 28, 1950, a Motion for Bill of Particulars was filed in the District Court on behalf of the appellant [R. 9-38]. On September 25, 1950, after a hearing on the above motions by the District Court, a Minute Order was entered by the Court denying the motions of appellant [R. 38-40].

On October 30, 1950, the appellant pleaded not guilty to all counts of the Indictment [R. 40-42]. On April 24, 1951, the appellant changed his plea of not guilty to that of *nolo contendere* as to Counts Two and Four of the Indictment.

On June 4, 1951, appellant was sentenced to imprisonment of six months on Count Two and to pay a fine of $1,000 on Count Four and to stand committed until paid or until he is discharged therefrom by due process of law [R. 43]. Notice of Appeal was filed on June 14, 1951 [R. 44].

Statutes and Regulations Involved.

(a) Penal Statute.

Section 1731(a) of Title 12 of the United States Code Supplement provided:[3]

> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of the said Administration under this chapter, makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be punished by a fine of not more than $3,000 or by imprisonment for not more than two years, or both.

---

[3]This text now appears as Section 1010 of Title 18 of the United States Code.

(b) Statute of Limitations.

Section 3282 of Title 18 of the United States Code provides:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

(c) Wartime Suspension of Limitation Statutes.

Section 3287 of Title 18 of the United States Code provides:

When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

Section 590a of Title 18 of the United States Code provides:

The running of any existing statute of limitations applicable to any offense against the laws of the United States (1)involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1646 of Appendix to Title 50, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

(d) Proclamation of Cessation of Hostilities.

Proclamation 2714, Federal Register Volume 12, No. 1, Page 1:

With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a

world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

(e) Governing Regulations.

Title 24, Housing Credit, Ch. V—Federal Housing Administration, Subchapter A—Property Improvement Loans, Part 501—Class 1 and Class 2 Property Improvement Loans (Federal Register, Volume 9, Page 7253).

Section 501.2(j).

"Class 1 (a) loan" means a loan, other than a loan defined in paragraph (k) of this section as a "Class 1 (b) loan" which is for the purpose of financing the repair, alteration, or improvement of an existing structure or of the real property in connection therewith, exclusive of the building of new structures. The term "existing structure"

means a completed building that has or had a distinctive functional use.

Section 501.2 (k)

"Class 1 (b) loan" means a loan which is (1) made for the purpose of financing the alteration, repair, improvement, or conversion of an existing structure located in an area or locality in which the President shall find that an acute shortage of housing exists or impends, which would impede national war activities and (2) is made for the purpose of providing additional living accommodations to which the borrower shall establish in a manner and upon forms prescribed by the Commissioner that occupancy priority will be given to war workers.

Summary of Argument.

The argument of the appellee is divided into three parts. (1) The first part is in answer to the contention of appellant that Section 3287 of Title 18 of the United States Code is inapplicable to the statute under which the appellant was indicted, namely, Section 1731(a) of Title 12 of the United States Code. (2) The second part discusses the contention of the appellant that assuming Section 3287 to be applicable to the offense charged, the language of Section 3287 does not save offenses committed after December 31, 1946, and prior to June 28, 1947, for prosecution on or after June 28, 1950. (3) The third part deals with appellant's attack on the sufficiency of Count Four of the Indictment.

ARGUMENT.

I.

Section 3287 of Title 18 of the United States Code, Known as the Suspension Act, or Statute, Is Applicable to Section 1731(a) of Title 12 of the United States Code.

1. One argument advanced by the appellant is that Section 1731(a) of Title 12, U. S. C., is not definitive of an offense "involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not."[4] Considerable reliance is placed by appellant on the case of *Marzani v. United States,* 168 F. 2d 133. The Government finds nothing in the *Marzani* opinion to impeach the ruling of the District Court on the questions again raised by the appellant here.

The Court in the *Marzani* decision concluded that in order for the Suspension Act to apply, defrauding the United States in a pecuniary way must be an essential ingredient.[5] Now, the appellant appears to derive from the language of the decision the rule that a statute within the Suspension Act is one in which an accomplished pecuniary loss to the United States is an essential element to be alleged and proved (A. B. 10-12). This cannot be, for the Suspension Act requires only that the offense be one "involving fraud or *attempted fraud*" (emphasis added); also, an examination of every criminal statute in the United States Code under the index entitlement of

---

[4]Section 3287 of Title 18, U. S. C.

[5]At page 136 of the reported decision.

"fraud" reveals no statute in which *accomplished* pecuniary fraud of the United States or an agency of the United States is made an essential element of the offense. It is extremely doubtful that there has ever been a criminal statute enacted by Congress in which accomplished fraud was an element for proof. The *Marzani* decision places within the Suspension Act all offenses consisting of certain acts done by the wrongdoer *with specific intent to defraud the United States in a pecuniary sense.* The words "essential ingredient" were employed by the Court at page 136 of the decision in place of the words "specific intent," and were meant to convey the same meaning.

In applying the rule of the *Marzani* case to Section 1731(a) of Title 12, we first observe that the offense is one requiring a specific intent. The appellant has apparently failed to recognize this most important element of the statute under which he is charged, for it will be observed that it is not included by him as a portion of the "gravamen of the offenses" (A. B. 8). Counts Two and Four of the Indictment charge the specific intent in the language of the statute, to wit: "with the intent that such loan and advance of credit should be offered to and accepted by the Federal Housing Administration for insurance." A reading of the entire statute clearly reveals that its purpose is to discourage those who would by false representations induce the Federal Housing Administration to assume the risk of financial loss in instances where the risk would not have been taken had the truth been known to the Agency. It is difficult to conceive how the false procurement of these guarantees, making the loans possible, was not a pecuniary fraud in the most obvious sense. The intent to work a pecuniary fraud on the Federal Housing Administration is spelled out in the statute

with particularity making it an essential element to be alleged and proved. The appellant and his associates acted to place the burden of ultimate financial loss on the United States in order that they might gain financially, and this was accomplished by the appellant and others by the device of falsification of loan applications. An excellent definition of fraud, in relation to contractual situations such as we have here appears in the Civil Code of Louisiana, Article 1847. It reads as follows:

> "Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage, to the one party, or to cause an inconvenience or loss to the other."

It is apparent that the wilful falsification with which we are here concerned was executed with design to gain an unjust financial advantage and to cause a financial loss to the United States.

2. The other leading case on the interpretation of the Suspension Act is *United States v. Gottfried,* 165 F. 2d 360. This case and the *Marzani* case appear to be in opposition on their definition of the word fraud as it appears in the Suspension Act. The definition of fraud as it appears in the *Gottfried* decision, at page 136, "includes any conduct, 'calculated to obstruct or impair its' (the United States') 'efficiency and destroy the value of its operations and reports.'" There is no doubt that Section 1731(a) of Title 12 comes within this broad definition of fraud. In the *Gottfried* case the Second Circuit held that Section 80 of Title 18, U. S. C. (1946 Edition) was within the Suspension Act. The offense involved was the making of false and fraudulent statements to the Office of Price Administration in obtaining sugar ration coupons. The

Marzani decision unequivocally holds that Section 80 of Title 18, U. S. C., *is not* within the Suspension Act. There has been no ruling by the Supreme Court of the United States to resolve this split of authority. The *Marzani* decision was reviewed by the Supreme Court on the application of the defendant, who had been convicted on counts of the indictment alleging offenses within the three-year limitation, and his appeal was concerned only with those counts. There is nothing to indicate that the Supreme Court had before it the question of the application of the Suspension Act. Marzani's conviction was affirmed. Gottfried applied to the Supreme Court for certiorari and his application was denied. We might with some justification assume that the denial of the writ of certiorari in the *Gottfried* case is more indicative of the attitude of the Supreme Court in favor of the broad application of the Suspension Act, than is the affirmance of the Marzani conviction by that Court.

The reported decisions uniformly follow the rule of the *Gottfried* case.

United States v. Agnew, 6 F. D. R. 566 (Eastern District of Pennsylvania);

United States v. Bridges, 86 Fed. Supp. 922;

United States v. Choy Kum, 91 Fed. Supp. 769.

In *United States v. Gould,* No. 21290-Criminal, Southern District of California, the defendant challenged the sufficiency of an indictment charging him under Section 80 of Title 18, U. S. C., with falsifying and causing the falsification of a veteran's war surplus purchase application made to the War Assets Administration. The offense was alleged to have occurred in April, 1947, and the indictment was returned in May, 1950. Judge Ben Harrison denied the

motion of defendant to quash the indictment, after argument, ruling that the Suspension Act was for application to Section 80, Title 18, U. S. C. The pecuniary aspect of fraud was entirely lacking in the *Gould* case.

This Court has already suggested a preference for the broad rule of the *Gottfried* decision in *Furrow v. Koutsky-Brennan-Vana Company,* 182 F. 2d 496, and *Danebo Lumber Company v. Koutsky-Brennan-Vana,* 182 F. 2d 489.

The appellant has cited the cases of *United States v. Mellen,* 96 F. 2d 462, and *United States v. Obermier,* 186 F. 2d 243, in support of his argument that the Suspension Act does not apply to Section 1731(a) of Title 12, U. S. C. In the *Mellen* case the question of the applicability of the Suspension Act was not an issue. In the *Obermier* case the Court devotes two paragraphs at the end of a rather lengthy decision, to discuss the applicability of Section 3287 of the Suspension Act to an indictment charging a false statement under oath in a matter relating to naturalization and citizenship. The language employed by the Court does no more than affirm what the same Court held in the *Gottfried* case, namely, that fraud must be an ingredient under the statute defining the offense in order for the statute to come within the Suspension Act. There is nothing in the *Obermier* case to suggest in the slightest that the Second Circuit is subscribing to the pecuniary fraud doctrine of the *Marzani* case. The only reference to the *Marzani* case in the *Gottfried* decision is in a footnote at the bottom of the second column of page 257 of the reported decision which reads: "See also Marzani v. United States, 83 U. S. 8 App. D.C. 78, 168 F. (2d) 133." In the same footnote the Court mentions that in *Gottfried v. United States* they had interpreted

Section 80 of Title 18, U. S. C., as an offense so defined as to make fraud an ingredient. We have failed to discover any basis for the appellant's assertion on page 16 of his Opening Brief that the *Obermier* case was based upon the decision of the *Marzani* case. There is nothing in the *Obermier* case to remotely suggest this. It has never been the contention of the Government that the Suspension Act embraced any statute in which fraud was not an ingredient.

3. The failure of the Courts to adopt the views expressed in the *Marzani* case is probably occasioned chiefly by the difficulty the Courts have in construing the obviously broad language of the Suspension Statute in so narrow a manner. There are other weaknesses in the decision which have probably lead to its rejection. We refer particularly to certain statements in the opinion which appear to be made with no foundation. At page 136, the Court said:

> "The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; * * *"

No where else in the decision does the Court set out its authority for this statement, and the Government has been unable to find any Supreme Court decision stating clearly or otherwise that pecuniary fraud is an essential ingredient of those offenses under the false claims act.

In conclusion, the Government submits that the fraud which is an element in Section 1731 (a) of Title 18 U. S. C. is within the definition of fraud as expressed in either the *Marzani* or *Gottfried* cases.

II.

The Operation of Section 3287 of Title 18 of the United States Code Allows the Prosecution of Counts Two and Four of the Indictment at Any Time Up to January 1, 1953.

The argument of the Appellant is that the Suspension Act did not operate to effect any offense committed after the Presidential Proclamation. The language of the Suspension Statute to be construed is as follows:

> "When the United States is at war, the running of any existing statute of limitations * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President * * *"

The Presidential Proclamation terminating hositilities is set out earlier in our brief. It bears the date December 31, 1946. Three years from that date, namely, December 31, 1949, is the time that the running of the normal three-year statute of limitations again commenced. From December 31, 1949, Section 3282 of Title 18, U. S. C. was again effective. The appellant states at page 20 of his Opening Brief that "Section 3287 suspended the statute of limitations until three years after the termination of hostilities as proclaimed by the President." This is not a correct statement of the language of the Suspension Act, for certain words were omitted; and it would appear that from this first erroneous premise the appellant has attempted to develop his argument. The correct statement is that the Suspension Statute suspended the *running of* the statute of limitations. It is the position of the

Government that the operation of the statute of limitations as to Counts Two and Four was suspended by the express language of the Suspension Act until December 31, 1949, at which time the statute again became effective and the three year statutory period again started to run and will have run out at the end of 1952. The statute of limitations was tolled by the Suspension Act, *United States v. Bridges, supra, Danebo Lumber Company v. Koutsky-Brennan-Vana Co., supra.*

Any other interpretation of the operational effect of the language of the statute leads to a strange result when applied to the original Suspension Act of World War II, (Act of August 24, 1942; 56 Stat. 747; Title 18 U. S. C. Supp. II, Section 590a.) This Suspension Act was framed in substantially the same language as the successor Suspension Acts with the exception that it operated to suspend the running of any statute of limitations until June 30, 1945. Actually, the only difference between the statutes was that the 1942 Act set out a definite date at which time the statute of limitations should again be operative, whereas the present Suspension Statute established a formula by which the lifting of the suspension may be calculated with reference to a contingent event. The Appellant's theory, when applied to the 1942 Suspension Act, would have resulted in the barring from prosecution of an offense committed on June 29, 1942, while we were at war, if the indictment were returned after June 29, 1945.

III.

Count Four of the Indictment States a Public Offense and Is Otherwise Sufficient.

The appellant has challenged the sufficiency of Count Four of the Indictment. He bases his attack on the theory that the Count failed to state that the "Application therein described was for credit or the amount thereof" (A. B. 31).

The language employed in Count Four varies from the pattern of Count Two and the other substantive counts of the Indictment in one respect only. Count Four does not allege the precise amount of credit requested in the credit application. It does state that the application was made for credit, in the following passages:

> "* * * for the purpose of obtaining a loan and an *advance* of *credit* * * * with the intent that such loan and *advance* of *credit* should be offered to and accepted by the Federal Housing Administration * * * the defendants did prepare and present * * * a written Federal Housing Administration Title I *Credit* Application * * * *said application stating and representing that said credit* * * * the defendants then knew that the *loan and credit* so applied for * * *." (Emphasis added.)

Appellant's considerable argument that Count Four fails to show that the application form contained a request for credit ignores particularly that portion of the Count which says "* * * said application stating and representing that said credit was to be used * * *."

Appellant states (A. B. 33) that he sought to elicit information that would be curative of the omissions, by a Motion of a Bill of Particulars. An examination of

the portion of the appellant's Bill of Particulars referring to Count Four does not bear this out. We refer to item 25 [R. 13], item 66 [R. 24], item 105 [R. 31]. There is nothing in the Bill of Particulars to indicate that appellant distinguished Count Four from the other counts of the Indictment; and there is clearly no request that the omitted amount be stated. The case of *Michener v. United States,* 170 F. 2d 975, also cited by appellant (A. B. 33), contains this language:

> "'If the indictment or information fails to allege any matter of substance, that is, any material ingredient of the crime, it is fatally defective. If, however it fails to advise the defendant with sufficient particularity of matters necessary to enable him to prepare his defense and to safeguard him from further prosecution for the same act, such details may be supplied by a bill of particulars without affecting the integrity of the prosecution. In such case, the duty devolves upon a defendant to make seasonable and appropriate application for the information desired.' Myers v. United States, 8 Cir., 15 F. 2d 977, 985."

This appellant here failed in that duty which devolves upon him to make the reasonable and appropriate application; and after pleading to Count Four, he now for the first time has challenged its sufficiency.

The modern practice of the Federal Courts, especially since the adoption of the Federal Rules of Criminal Procedure, is to consider the adequacy of Indictments on the

basis of practical as opposed to technical considerations. The Federal Rules of Criminal Procedure, Rule 7(c), provide as follows:

> "(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

An inspection of Count Four reveals that it meets the requirement of this Rule. The date is designated, the place of the transaction is designated, the defendants are named, the application is sufficiently described by the above date and by naming the applicants and the location of the proposed improvements. It alleges that the appellant and others falsified the application with the requisite specific criminal intent.

These allegations sufficiently earmark and identify the offense.

It is submitted that these allegations,

(a) Inform the Appellant of the offense with which he is charged; and

(b) Are sufficiently certain to safeguard the accused from a second prosecution for the same act.

This Circuit, in the case of *U. S. v. Bickford,* 168 F. 2d 26 (C. C. A. 9), discussed an indictment with relation to the New Rules. In the *Bickford* case the District Court had held a perjury indictment to be insufficient because it did not directly aver that the officer administering the oath had competent authority to administer same. In reversing the District Court's holding and in declaration

of the sufficiency of the indictment, this Circuit stated as follows:

> "The criminal rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. Certainly Rule 7(c) was not intended to be less liberal than is the modern practice of the federal courts to consider the adequacy of indictments on the basis of practical as opposed to technical considerations. It has long been settled in the federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the offense with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act. Hagner v. United States, 285 U. S. 427, 52 S. Ct. 417, 76 L. Ed. 861; Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314; Hopper v. United States, 9 Cir., 142 F. 2d 181. As observed in Hagner v. United States, *supra,* at page 433 of 285 U. S., at 420 of 52 S. Ct., 'it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.' "

More recently this Circuit again sustained the sufficiency of an indictment with relation to the requirements of Rule 7(c), Federal Rules of Criminal Procedure.

See:

Flynn v. U. S., 172 F. 2d 12 (C. C. A. 9).

In the *Flynn* case an indictment for perjury merely alleged that the defendant, while testifying under oath, stated in open court certain material matter which he did not believe to be true, and then described the testimony of the accused. This was held to be sufficient under Rule

7(c), even though it did not contain the additional charge that the testimony given was in fact false. The court points out that the charges are stated in terms that protect the accused from the danger of being put in double jeopardy.

As an additional illustration of a recent ruling of the courts, we refer to a recent case decided by the Circuit, namely, *U. S. v. Ochoa,* 167 F. 2d 341 (C. C. A. 9). In that case, this court held that the omission in a murder charge of the phrase "with malice aforethought", as is provided in the statutory definition of murder (18 U. S. C., Section 452), was not bad. The court pointed out that the indictment in the *Ochoa* case was modeled after form No. 1 in the Appendix to the Federal Rules of Criminal Procedure.

This Circuit has again reaffirmed a liberal interpretation in construing an indictment in the case of:

McCoy v. U. S., 169 F. 2d 776 (C. C. A. 9).

In the *McCoy* case this court sustained a challenged count of an indictment charging the presentation of false claims and for aiding and abetting the so doing, . . . a situation quite similar to that now confronting this court. It was held by this court that every particular relating to such charge need not be set out in the indictment and also it was pointed out that the indictment must be considered as a whole:

> "Appellant's construction of the indictment is too narrow. In the first place every particular relating to the charge is not required to be set out in the indictment, and it is not required that every possible combination of facts, which would constitute legal acts, should be negatived in it. . . . The indictment

must be considered as a whole, and the violated statute is cited in it and plainly informs the accused of the law allegedly violated."

The case of *Eisler v. U. S.,* 170 F. 2d 273 (C. A. D. C.), at pages 280-281, further illustrates the attitude of the courts in sustaining the sufficiency of an indictment, especially since the adoption of the Federal Rules of Criminal Procedure, *i. e.,* Rule 7(c).

Conclusion.

The crime here charged is the falsification of Credit Application to induce the Government to insure certain loans. The Indictment charges an offense in which a pecuniary fraud is an ingredient; and in which fraud in the broader sense is an ingredient. The Indictment was filed in time by reason of the operation of the Wartime Suspension Statute, and all Counts were sufficiently drawn. The judgment below should be affirmed.

ERNEST A. TOLIN,
United States Attorney;

WALTER S. BINNS,
Chief Assistant U. S. Attorney;

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division;

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Attorney;

RAY M. STEELE,
Assistant U. S. Attorney,

Attorneys for Appellee.